

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

PRESENT:

**Mr. Justice Md. Nuruzzaman**  
**Mr. Justice Borhanuddin**  
**Ms. Justice Krishna Debnath**

**CIVIL PETITION FOR LEAVE TO APPEAL NO.991 of 2021.**

(From the judgment and order dated 01.06.2017 passed by the High Court Division in Writ Petition No.822 of 2015).

The Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Finance, Internal Resources Division, Segunbagicha, Ramna, Dhaka and others. : .....Petitioners.

-Versus-

Moazzam Hossain, Proprietor of M/s. : .....Respondent.  
Abdullah Traders, 12, Madan Pal Lane, Nawabpur Road, Dhaka.

For the Petitioners. : Mr. Sk. Md. Morshed, Additional Attorney General with Mr. Samarendra Nath Biswas, Deputy Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Respondent. : Not represented.

Date of Hearing : **The 11<sup>th</sup> April, 2022.**

**J U D G M E N T**

**Borhanuddin, J:** Delay of 1402 days in filing this Civil Petition for leave to appeal is hereby condoned.

This civil petition for leave to appeal is directed against the judgment and order dated 01.06.2017 passed by the High Court Division in Writ Petition No.822 of 2015 making the Rule absolute.

The facts, in brief, are that the respondent herein as petitioner preferred the writ petition impugning demand notice dated 06.01.2015 under section 83A of the Customs Act derogating/bypassing section 32(3) of the Customs Act, 1969 stating interalia that the petitioner opened a letter of credit on 09.04.2014 for importation of spare parts of Agricultural Diesel Engine and Power Tiller from China under applicable H.S. Code; After arrival of the goods, the petitioner submitted Bill of Entry on 23.06.2014 for releasing the goods as per declaration; After completion of assessment the petitioner released the goods on payment of duties and taxes on 30.06.2014 as per assessment made by the Customs Authority; On 06.01.2015 the Commissioner of Customs issued a demand notice under section 83A of the Customs Act directing the petitioner to deposit Tk.2,03,974.12/- as short levied duties and taxes within 30(thirty) days stating that after post clearance audit it reveals that the petitioner released the goods declaring wrong H.S. Code of the imported goods and thus the petitioner is liable to pay additional amount of duties and taxes under

actual H.S. Code. By the demand notice the petitioner is asked to submit written objection, if any, and mention in the written objection whether the petitioner is willing for hearing of the matter. The petitioner filed an application on 11.01.2015 to the Commissioner of Customs for withdrawal of the demand contending interalia that the petitioner imported machineries alongwith spare parts as such assessing authority assessed the goods under SRO No.145 dated 03.06.2013 at a concessionary rate of duties and taxes but getting no response the petitioner is constrained to invoke writ jurisdiction.

Upon hearing the petitioner, a Division Bench of the High Court Division issued a *Rule Nisi* upon the respondents to show cause and also stayed operation of the impugned demand notice.

The writ-respondent no.1 contested the Rule by filing an affidavit-in-opposition contending interalia that the customs authority is vested with the power to make such amendment to an assessment as may be necessary for the purpose of realizing Custom duties and taxes which had not been paid earlier. It is also stated that the

provision of section 32(3) of the Customs Act will not applicable in the instant case as section 32(3) is a Penal section whereas section 83A of the Act is a non punitive section.

Upon hearing the learned Advocate for the parties and perusing the annexures appended with the writ petition, a Division Bench of the High Court Division made the Rule absolute declaring the demand notice dated 06.01.2015 issued under section 83A of the Customs Act as without lawful authority.

Feeling aggrieved, the respondents as petitioners preferred instant civil petition for leave to appeal under Article 103 of the constitution.

Mr. Sk. Md. Morshed, learned Additional Attorney General appearing for the present petitioners at the very outset drew our attention to the observation made by the High Court Division in the impugned judgment and order that 'section 83A will apply in a case where the assessment is yet to be completed i.e. where the goods have been released on provisional assessment pending final assessment,' which is a wrong proposition of law

and based on this wrong proposition the High Court Division arrived at a wrong conclusion as such impugned judgment and order is liable to be struck down. He also submits that the High Court Division wrongly passed the impugned judgment and order without appreciating the fact that the Customs Authority issued the demand notice under section 83A by giving opportunity to reply and also affording opportunity of hearing as such impugned judgment and order requires to be interfered.

No one represent the respondents.

Heard the learned Additional Attorney General. Perused the papers/documents contained in the Civil Petition for Leave to Appeal.

We have gone through the judgment and order passed by the High Court Division. For better appreciation, section 83A of the Customs Act is reproduced below:

*"83A: Amendment of assessment-(1) An officer of Customs not below the rank of an Assistant Commissioner of Customs may, from time to time, make or cause to be made such amendments to an assessment of duty or to the value taken for the purpose of assessment of duty as he thinks necessary in order to ensure the correctness of the*

assessment, even though the goods to which the value or the duty relates have already passed out of Customs control or the duty originally assessed has been paid.

(2) If the amendment has the effect of imposing a fresh liability or enhancing an existing liability, a demand notice in writing shall be given by the officer of Customs to the person liable for the duty.

(3) Unless otherwise specified in this Act, the due date for payment against the aforesaid demand notice shall be thirty working days from the date of issue of such a written demand notice by the officer of Customs."

(emphasis supplied by us.)

The High Court Division after quoting the relevant section 83A arrived at a finding that:

"A careful reading of section 83A indicates that the provisions of this section will apply to a case where the assessment is yet to be completed. In other words, where the provisional assessment has been made and the goods have been released by the Customs Authority pending final assessment, in such event, the provisions of section 83A will come into play.

It is important to note that the word used in section 83A is "assessment". Therefore, there is distinction between the words "assessment order" and "assessment". While the former relates to an event which is

*concluded and completed upon final assessment of the imported goods, the latter refers to a stage where the final assessment is yet to be made.*

*In our view, section 83A applies to a case where provisional assessment has been made, but the final assessment is yet to be made, even though the goods may have been released by the Customs Authority upon realization of duties and taxes.*

*On the other hand, a careful reading of section 32(3) leaves no room for doubt that the said section applies to a case where the goods have already been released upon completion of the final assessment. However, in such case, if there is an error or inadvertence or misconstruction, as the case may be, the Customs Authority is empowered to make a demand for the amount which is due from an importer on account of Customs duties and taxes, subject to the said demand being made within a period of 3(three) years from the relevant date. However, this section also provide for issuance of a show cause notice prior to making such demand."*

In arriving such a finding the High Court Division overlooked section 81 of the Customs Act which runs as follows:

*"81. Provisional assessment of duty-  
(1) Where it is not possible immediately to assess the customs duty that may be payable on any imported goods entered for home*

consumption or for warehousing or for clearance from a warehouse for home consumption, or on any goods entered for exportation, for the reason that the goods required chemical or other test [or a further enquiry] for purposes of assessment, or that all the documents or complete documents or full information pertaining to those goods have not been furnished, an officer not below the rank of [Assistant Commissioner of Customs] may order that the duty payable on such goods be assessed provisionally:

Provided that the importer (same in the case of goods entered for warehousing) or the exporter pays such additional amount as security or furnishes such guarantee of a scheduled bank for the payment thereof as the said officer deems sufficient to meet the excess of the final assessment of duty over the provisional assessment.

(2) Where any goods are allowed to be cleared or delivered on the basis of such provisional assessment, the amount of duty actually payable on those goods shall, [within a period of one hundred and twenty working days from the date of the provisional assessment], where there is a case pending at any court, tribunal or appellate authority, from the date of receipt of the final disposal order of that case, be finally assessed and on completion of such assessment the appropriate officer shall order that the amount already paid or



*guaranteed be adjusted against the amount payable on the basis of final assessment, and the difference between them shall be paid forthwith to or by the importer or exporter as the case may be [:]*

*[Provided that the Board may, under exceptional circumstances recorded in writing, extend the period of final assessment specified under this subsection.]”*

(emphasis supplied by us.)

So it appears from the language of section 81 that when it is not possible immediately to assess the Customs duty for the reason that the goods require chemical or other test or a further inquiry for the purpose of assessment or complete documents or full information relating to the imported goods have not been furnished then the duty payable on such goods shall be assessed provisionally. It is also specified in the section that the final assessment shall be completed within a period of 120 working days from the date of the provisional assessment and under exceptional circumstances the National Board of Revenue can extend the period of final assessment.

On the other hand, section 83A provides amendment of assessment in order to ensure the correctness of the assessment of the goods made earlier and the duty originally assessed had been paid and goods are released on the basis of original assessment and it is also provided that if the amendment has the effect of imposing a fresh liability or enhancing an existing liability, a demand notice in writing shall be given by the officer of the Customs to the person liable for payment of the duty specifying time limit of 30(thirty) working days for payment against the aforesaid demand notice from the date of issue.

And section 83B prescribe time frame for amendment of assessment which cannot be issued after expiration of 3(three) years from the date on which the original assessment was made unless any declaration made in relation to the imported goods was fraudulent or wilfully misleading.

From the aforementioned sections 81, 83A and 83B of the Customs Act it is apparent that the purpose of provisional assessment and the time frame therein for

final assessment and the purpose of section 83A and the prescribe time limit therein are all together separate.

The provision of section 32 relates to untrue statement, error, etc. which has no nexus with either section 81 or section 83A of the Customs Act.

By now it is settled by the pronouncement of the apex court that a show cause notice is required to be served upon the notice receiver. Accordingly section 83A(2) provides that if the demand has the effect of imposing a fresh liability or enhancing an existing liability, a demand notice in writing shall be given by the officer of Customs to the person liable for the payment of additional duty and section 83A(3) mandates that unless otherwise specified in this Act, the due date for payment against the aforesaid demand notice shall be 30(thirty) working days from the date of issuance of such a demand notice by the officer of Customs.

From the impugned demand notice annexed to the writ petition (Annexure-'F') it is evident that after narrating the reason for imposition of fresh liability by

way of demanding additional duties and taxes it is stated in paragraph-4 of the demand notice:

“০৪। এমতাবস্থায়, দি কাস্টমস এ্যাক্ট, ১৯৬৯ এর সেকশন ৮৩এ, সেকশন ৮৩বি অনুযায়ী পুনঃ গুণায়নপূর্বক অতিরিক্ত আদায়যোগ্য ও অপরিশোধিত রাজস্ব বাবদ সর্বমোট টাকা = ২,০৩,৯৭৪.১২ (দুই লক্ষ তিন হাজার নয়শত চুয়ত্তর টাকা বার পয়সা মাত্র) দাবীনামা জারী করা হলো। উল্লিখিত দাবীনামাকৃত টাকা ৩০ (ত্রিশ) দিনের মধ্যে সরকারী কোষাগারে জমা দানের জন্য আপনাকে বলা হলো। উপর্যুক্ত বিষয়ে আপনার কোন বক্তব্য থাকলে তা উক্ত সময়ের মধ্যে লিখিতভাবে নিম্নস্বাক্ষরকারীকে অবহিত করার জন্য বলা হলো। আপনি এতদ্বিষয়ে শুনানী প্রদানে ইচ্ছুক হলে তা লিখিত বক্তব্যে উল্লেখ করতে হবে।”

It is apparent that though the petitioner was afforded an opportunity to reply and hearing but the petitioner without availing the opportunity invoke the writ jurisdiction impugning the demand notice.

The High Court Division without considering paragraph-4 of the demand notice erroneously declared issuance of demand notice without lawful authority and made the Rule absolute referring section 32(3) of the Customs Act.

Section 32 relates to untrue statement, error, etc.

The relevant section is quoted hereinunder:

“32.(1) *If any person, in connection with any matter of customs,-*

(a) *Makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of Customs any*

declaration, notice, certificate or other document whatsoever, or

(b) Makes any statement in answer to any question put to him by an officer of Customs which he is required by or under this Act to answer, [or]

(c) Transmits any statement, document, information or record through electronic device or produces soft copy thereof,] and such document or statement is untrue in any material particular, he shall be guilty of an offence under this section.

(2) Where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within three years of the relevant date, (the word and comma 'within three years of the relevant date', were omitted by Section 5 of the Finance Act, 2010 (Act No. XXXIII of 2010) requiring him to show cause why he should not pay the amount specified in the notice.

(3) Where, by reason of any inadvertence, error or misconception, any duty or charge [amounting to not less than one thousand taka] has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice, within [three years] of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice."

Thus it appears that the High Court Division made the Rule absolute by taking an erroneous view without interpreting section 83A of the Customs Act in its true perspective.

Accordingly, the civil petition for leave to appeal is disposed of with the above observation.

Impugned judgment and order dated 01.06.2017 passed by the High Court Division in Writ Petition No.822 of 2015 is set aside.

**J.**

**J.**

**J.**